

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FRANCISCO GARCIA,

Plaintiff,

v.

A.A. LAMARQUE and JAMES TILTON,

Defendants.

No. C 09-02235 CW

ORDER GRANTING
DEFENDANTS' MOTION
TO DISMISS AND
DENYING MOTION FOR
SUMMARY JUDGMENT AS
MOOT (Docket No.
24); DENYING
PLAINTIFF'S MOTION
TO COMPEL DISCOVERY
RESPONSES (Docket
No. 30); AND DENYING
PLAINTIFF'S RENEWED
MOTION FOR
APPOINTMENT OF
COUNSEL (Docket No.
35).

Plaintiff Garcia, a state prisoner proceeding pro se and in forma pauperis, brings an action under 42 U.S.C. § 1983, alleging that Defendants Lamarque and Tilton violated his Eighth Amendment rights. Defendants now make an unenumerated Rule 12(b) motion to dismiss the Complaint for failure to exhaust administrative remedies under the Prison Litigation Reform Act. They also move to dismiss on the basis that the claims are barred by the statute of limitations and that Plaintiff cannot establish Defendants' liability vicariously or in their official capacities under § 1983. In the alternative, Defendants move for summary judgment under Rule

1 56(c). Plaintiff opposes the motions. The motions were taken
2 under submission on the papers. Having considered all of the
3 papers filed by the parties, the Court GRANTS Defendants' motion to
4 dismiss.¹

5 BACKGROUND

6 Plaintiff is a prisoner at Calipatria State Prison serving a
7 sentence of life imprisonment without possibility of parole. He
8 brings this § 1983 action against Defendant Lamarque, the former
9 Warden of Salinas Valley State Prison (SVSP), and Defendant Tilton,
10 the former Secretary of the California Department of Corrections
11 and Rehabilitation (CDCR). The Complaint alleges that Plaintiff
12 was supplied with contaminated "brown water" for drinking and
13 bathing during his incarceration at SVSP, exposing him to H. pylori
14 bacteria and its attendant consequences, including a rash and
15 chronic gastrointestinal illness. According to the Complaint,
16 Defendants Lamarque and Tilton were in positions of authority at
17 the time of the contamination but did not act to protect Plaintiff
18 from exposure.

19 Plaintiff's first period of incarceration at SVSP began in
20 July 2001. During a quarterly test of water quality on June 24,
21 2004, SVSP staff discovered that nitrate levels in the prison's
22 well water were above the maximum concentration allowed by the
23 California Department of Public Health. The following day, Acting
24 Warden Edward Caden sent a notice containing information about the
25 elevated nitrate levels to all inmates at SVSP. Decl. of Sam

26
27 ¹ Because the Court grants the motion to dismiss, Defendants'
28 motion for summary judgment is denied as moot.

1 Ochoa, Ex. A.

2 On July 29, 2004, Plaintiff was transferred to Corcoran State
3 Prison (CSP). In August 2004, Plaintiff sought medical treatment
4 at CSP because he "broke out in a 'bad rash'" after using wool
5 blankets given to him during the transfer. Pl.'s Ex. 2. In
6 September 2004, Plaintiff was transferred to the Administrative
7 Segregation Unit at SVSP in anticipation of court proceedings for
8 an unrelated matter. Decl. of Francisco Garcia, Ex. J. While at
9 SVSP, Plaintiff again sought treatment for his skin rash and
10 explained that he had dealt with it "for a couple of years." Pl.'s
11 Ex. 2. He was returned to CSP in January 2005. Plaintiff was
12 again transferred to the Administrative Segregation Unit at SVSP in
13 February 2005. Decl. of Garcia, Ex. K. At SVSP, Plaintiff saw a
14 physician for the rash once in February 2005 and again in March
15 2005. Pl.'s Ex. 2. In July 2005, Plaintiff was treated by Dr.
16 Arthur Huntley of University of California, Davis, who concluded
17 that Plaintiff suffered from folliculitis. Pl.'s Ex. 2.

18 In October 2005, Plaintiff was transferred back to CSP. He
19 sought medical treatment at the prison in May 2006 for "indigestive
20 problems" and made an additional three visits that month to request
21 medication refills. Pl.'s Ex. 2. In June 2006, he requested
22 health care services for "an emergency problem with [his]
23 indigestive [sic] system." Pl.'s Ex. 2. Plaintiff noted in his
24 request that he had experienced this problem "for quite some time
25 now." Pl.'s Ex. 2. That year, he made return visits to address
26 the issue once in June, once in July, three times in August, once
27 in September, and once in October, and was treated for gastritis

1 and "H. pylori gastritis." In November 2006, Plaintiff tested
2 negative for H. pylori infection. Decl. of Eva Morales, Ex. A.

3 After Plaintiff's gastrointestinal problems continued
4 unabated, he visited prison doctors several times throughout 2007
5 for treatment. In September 2007, Dr. Merle R. Sogge conducted a
6 gastric biopsy and diagnosed Plaintiff with chronic gastritis.
7 Based on the results of the biopsy, Dr. Sogge ruled out H. pylori
8 infection. Decl. of Morales, Ex. B. Plaintiff made several more
9 visits to doctors in 2007 and 2008 to address both the recurring
10 rash and gastrointestinal problems.

11 In September 2008, Plaintiff was transferred to Calipatria
12 State Prison. The following January, Plaintiff read a Prison Legal
13 News article about water contamination in California state prisons
14 and began corresponding with a representative from California
15 Prison Focus. Decl. of Garcia, Ex. A, B. On February 10, 2009, he
16 requested health care services for "gastric distress" and asserted
17 that he had developed the disorder after "drinking contaminated
18 water while [he] was at Salinas Valley State Prison." Pl.'s Ex. 2.

19 On March 8, 2009, Plaintiff submitted a CDC 602 Inmate/Parolee
20 Appeal Form ("Form 602") alleging that he had contracted an H.
21 pylori infection after drinking contaminated "brown water" at SVSP.
22 Decl. of Garcia, Ex. C. He demanded that prison officials remedy
23 the situation by (1) repairing the water filtration system at SVSP
24 to prevent future contamination; (2) reprimanding Defendants
25 Lamarque and Tilton; (3) providing ongoing medical treatment to
26 Plaintiff; and (4) compensating Plaintiff for pain and suffering.
27 On March 11, 2009, the Appeals Coordinator at SVSP screened out
28

1 Plaintiff's Form 602 because it was not timely. Decl. of Garcia,
2 Ex. D. The bottom of the Inmate/Parolee Appeal Screening Form sent
3 to Plaintiff contained the following message: "This screening
4 action may not be appealed. If you allege the above reason is
5 inaccurate, then attach an explanation on a separate piece of
6 paper . . ."

7 On April 5, 2009, Plaintiff forwarded the form and a letter
8 explaining his failure to file a timely Form 602 to the Director of
9 Corrections in Sacramento. Decl. of Garcia, Ex. E. In a reply
10 dated April 21, 2009, the chief of the Inmate Appeals Branch wrote
11 that his office had screened out Plaintiff's Form 602 because it
12 was "rejected, withdrawn, or cancelled at the institution level."
13 Decl. of Garcia, Ex. F. Plaintiff then sent a letter dated April
14 26, 2009, to the Inmate Appeals Coordinator at SVSP, again
15 explaining why he had filed a Form 602 years after exposure to the
16 contaminated water. Decl. of Garcia, Ex. G. He did not receive a
17 reply.

18 In May and June 2009, Plaintiff tested negative for H. pylori
19 infection two more times. Decl. of Morales, Ex. C, D. On May 29,
20 2009, Plaintiff commenced this action in federal court and was
21 thereafter granted leave to proceed in forma pauperis. (Docket
22 Nos. 1, 6). Defendants now move jointly to dismiss the Complaint
23 and, in the alternative, move for summary judgment. (Docket No.
24 24).

25 DISCUSSION

26 Defendants argue that the Complaint should be dismissed under
27 Rule 12(b) for three reasons: (1) Plaintiff failed to exhaust the
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1 administrative remedies of the California prison system as required
2 by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a);

3 (2) Plaintiff's claim is barred by the applicable statute of
4 limitations; and (3) § 1983 does not permit a theory of vicarious
5 liability or liability based on official capacity. Defendants
6 contend that if the claim is not dismissed, summary judgment should
7 be granted because there is no genuine dispute as to any material
8 fact and they are entitled to judgment on the Eighth Amendment
9 claim as a matter of law.

10 I. Failure to Exhaust Administrative Remedies

11 A. Legal Standard

12 The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134,
13 110 Stat. 1321 (1996) (PLRA), provides that "[n]o action shall be
14 brought with respect to prison conditions under [42 U.S.C. § 1983],
15 or any other Federal law, by a prisoner confined in any jail,
16 prison, or other correctional facility until such administrative
17 remedies as are available are exhausted." 42 U.S.C. § 1997e(a).
18 This exhaustion requirement is mandatory and not subject to the
19 discretion of the court. Booth v. Churner, 532 U.S. 731, 739
20 (2001). Non-exhaustion under § 1997e(a) is an affirmative defense
21 that must be raised and proved by a defendant in an unenumerated
22 motion to dismiss under Federal Rule of Civil Procedure 12(b).
23 Jones v. Bock, 549 U.S. 199, 216 (2007); Wyatt v. Terhune, 315 F.3d
24 1108, 1119 (9th Cir. 2003). In deciding such a motion, the court
25 may look beyond the pleadings and decide disputed issues of fact.
26 Wyatt, 315 F.3d at 1119-20.

27 The PLRA requires "proper exhaustion" of administrative
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1 remedies. Woodford v. Ngo, 548 U.S. 81, 93 (2006). To meet this
2 exacting standard, prisoners must not only lodge a formal
3 complaint, but also pursue it through each stage of the
4 administrative process in "compliance with an agency's deadlines
5 and other critical procedural rules." Id. at 90. The requirement
6 cannot be satisfied "by filing an untimely or otherwise
7 procedurally defective administrative grievance or appeal." Id. A
8 prisoner must exhaust even when the remedy he or she seeks is
9 unavailable through the grievance process. Id. at 85-86 (citing
10 Booth, 532 U.S. at 734); see also Morton v. Hall, 599 F.3d 942, 945
11 (9th Cir. 2010). A prisoner must also exhaust claims before filing
12 a suit in federal court even though the administrative process may
13 not be "plain, speedy and effective." Porter v. Nussle, 534 U.S.
14 516, 524 (2002). A complaint must be dismissed if the prisoner did
15 not exhaust all available administrative remedies before the suit
16 was filed. Booth, 532 U.S. at 738; McKinney v. Carey, 311 F.3d
17 1198, 1199 (9th Cir. 2002).

18 State prison regulations define the contours of proper
19 exhaustion. Jones, 549 U.S. at 218. Under California law, inmates
20 have a right to an administrative appeal of "any departmental
21 decision, action, condition, or policy which they can demonstrate
22 as having an adverse effect upon their welfare." Cal. Code Regs.
23 tit. 15, § 3084.1(a)(2006).² Inmates also have a right to file
24 administrative appeals alleging misconduct by correctional

25
26 ² Art. 8, § 3084 of the California Code of Regulations has been
27 amended nearly a dozen times, most recently in 2005, 2006, and 2010.
Because Plaintiff filed his grievance in 2009, this Order cites
sections of the 2006 code.

1 officers. § 3084.1(e).

2 To exhaust all available administrative remedies, a prisoner
3 in California must complete a Form 602 and proceed through four
4 levels of appeal: (1) informal level grievance filed directly with
5 any correctional staff member; (2) first formal level appeal filed
6 with one of the institution's appeal coordinators; (3) second
7 formal level appeal filed with the institution head or designee;
8 and (4) third formal level appeal filed with the CDCR director or
9 designee. § 3084.5; Brodheim v. Cry, 584 F.3d 1262, 1264-65 (9th
10 Cir. 2009); Barry v. Ratelle, 985 F. Supp. 1235, 1237 (S.D. Cal.
11 1997). The prisoner must submit the initial appeal within fifteen
12 working days "of the event or decision being appealed" and resubmit
13 the appeal to each level of review within fifteen working days of
14 receiving a denial from the previous level. § 3084.6(c); Sapp v.
15 Kimbrell, 623 F.3d 813, 818 (9th Cir. 2010).³ If the appeal is
16 denied at the third formal level, the prisoner has exhausted his
17 administrative remedies under the PLRA. Barry, 985 F. Supp. at
18 1237-38.

19 B. Analysis

20 Plaintiff's Form 602 did not pass through each of the four
21 levels of administrative review as required by California's
22 grievance process for prisoners. Plaintiff submitted a Form 602
23 grievance for the first time in March 2009, more than three years
24 after he had been transferred from SVSP to Corcoran State Prison

25
26 ³ Regulatory amendments that took effect in 2011 give prisoners
27 thirty calendar days from the date of the incident to file an appeal.
28 See Cal. Code Regs. tit. 15, § 3084.8(b).

1 and several months after being transferred to Calipatria State
2 Prison. By the time he filed a Form 602 grievance, it had been
3 nearly three years since Plaintiff first brought symptoms of
4 digestive problems to the attention of medical personnel and more
5 than three years since his last conceivable exposure to
6 contaminated water at SVSP. It had been almost five years since
7 Plaintiff first complained about his rash.

8 Under the most generous view of the facts, Plaintiff's Form
9 602 was not timely under California's administrative process, which
10 in 2006 required that a grievance be submitted within fifteen days
11 of the incident from which the complaint arose. Cal. Code Regs.
12 tit. 15, § 3084.6(c) (2006). As a result, the Inmate Appeals
13 Coordinator at SVSP properly screened out Plaintiff's Form 602,
14 precluding consideration of the merits at any of the formal levels
15 of review.

16 This much Plaintiff concedes. However, he argues that his
17 failure to exhaust should be excused because did not realize that
18 he could have developed his illnesses from water contamination
19 until he read an article about California prison conditions in
20 2009. Plaintiff's failure to file a timely Form 602 and proceed
21 through each level of the administrative process cannot be excused
22 on this basis. The fifteen working day window in effect during
23 Plaintiff's tenure at SVSP accrued from "the event or decision that
24 [was] the subject of his complaint," not the time at which the
25 prisoner felt the effects of the event or discovered that he may
26 have a viable legal claim. Ngo v. Woodford, 539 F.3d 1108, 1109-10
27 (9th Cir. 2008); see also Harvey v. Jordan, 605 F.3d 681, 683-84

1 (9th Cir. 2010) (holding that inmate must file complaint alleging
2 excessive force within fifteen days of the date force was used, not
3 fifteen days from the date he developed respiratory problems caused
4 by that use of force).

5 Here, Plaintiff filed a grievance nearly five years after
6 using a wool blanket that allegedly caused him to develop a rash.
7 In September 2004, Plaintiff wrote the following on a request form
8 for medical services: "The other day when I was transferred from
9 Salinas Valley State Prison, I was given 'wool blankets.' I used
10 those 'woole [sic] blankets' one time and I broke out in a 'bad
11 rash.'" Plaintiff was required to file a Form 602 grievance within
12 fifteen days of using the blanket. The fact that Plaintiff
13 suspected a causal relationship between the blanket and his skin
14 rash within days of his transfer suggests that the short filing
15 window did not prevent him from making a timely complaint. Even if
16 the symptoms first appeared after the fifteen day filing period,
17 Plaintiff cannot justify a delay of almost five years.

18 To file a timely grievance for his gastrointestinal illness,
19 Plaintiff should have filed a Form 602 complaint within fifteen
20 days of consuming or bathing with the contaminated water that
21 allegedly made him sick. Plaintiff had sufficient information to
22 file a complaint within the fifteen day window. According to the
23 Complaint and Opposition, Plaintiff became sick shortly after
24 consuming visibly contaminated "brown water." He further
25 acknowledges that on June 25, 2004, SVSP officials distributed to
26 all prisoners a notice containing information about the nitrate
27 levels of water in the prison. Decl. of Francisco Garcia ¶ 4.

1 Even if Plaintiff developed symptoms after the fifteen day filing
2 period, the Court cannot overlook a delay measured not in days or
3 weeks, but years.

4 Plaintiff further argues that "the grievance procedrue [sic]
5 has been rendered unavailable to him" because his appeal was
6 screened out. Pl.'s Opp'n at 5. Plaintiff cites Hall v. Alameida,
7 2005 WL 2030728 at *3 (E.D. Cal.), in which the court concluded
8 that a prisoner had exhausted all administrative remedies after his
9 Form 602 appeal was screened out for procedural defects. However,
10 subsequently, in Woodford v. Ngo the Supreme Court explicitly
11 rejected that argument and held that the "proper exhaustion"
12 requirement prevents a prisoner from exhausting administrative
13 remedies simply by filing an untimely Form 602. 548 U.S. at 90-91.

14 Nonetheless, courts have power in equity to except prisoners
15 from the proper exhaustion doctrine under special circumstances.
16 Sapp, 623 F.3d at 827. The Ninth Circuit has held, for example,
17 that a prisoner's failure to exhaust can be excused if it results
18 from a prison warden's mistake. Nunez v. Duncan, 591 F.3d 1217,
19 1226 (9th Cir. 2010). Other circuit courts have found similar
20 exceptions to the exhaustion requirement. See, e.g., Brown v.
21 Croak, 312 F.3d 109, 112-13 (3d Cir. 2002) (prisoner told by
22 officials to delay filing grievance form until investigation was
23 complete); Dale v. Lappin, 376 F.3d 652, 656 (7th Cir. 2004)
24 (prisoner denied access to grievance forms); Turner v. Burnside,
25 541 F.3d 1077, 1085 (11th Cir. 2008) (prisoner threatened with
26 retaliation). However, none of these exceptions applies here, and
27 Plaintiff fails to make a cogent argument as to how he was
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1 precluded from filing a timely appeal.

2 Plaintiff cites Marella v. Terhune, 568 F.3d 1024 (9th Cir.
3 2009), in support of his contention that a screened out appeal
4 makes remedies "effectively unavailable." However, in that case,
5 the prisoner could not submit a timely Form 602 because he was in
6 the hospital, then moved to the prison infirmary, and finally
7 placed in administrative segregation. Id. at 1026. The Ninth
8 Circuit excused the prisoner from the exhaustion requirement after
9 concluding that he may not have had an opportunity to file a timely
10 appeal. Id. at 1027. Here, the facts do not support that
11 Plaintiff was in any way prevented from filing a grievance.
12 Plaintiff offers no evidence that he did not have access to a Form
13 602 or that he was otherwise prevented from making a timely
14 submission.

15 Booth is likewise inapposite. In that case, the Supreme Court
16 acknowledged that exhaustion is not required when the
17 administrative procedure "lacks authority to provide any relief or
18 to take any action whatsoever in response to the complaint." 532
19 U.S. at 736. Here, prison officials could have responded to
20 Plaintiff's request had a Form 602 been filed in a timely manner.
21 Plaintiff had the "opportunity and ability to file a grievance
22 timely" but elected not to do so. Marella, 568 F.3d at 1028.
23 Consequently, his claims must be dismissed.

24 The only remaining issue is whether Plaintiff's failure to
25 exhaust the administrative remedies available to him should result
26 in the dismissal of the complaint with or without prejudice. In
27 the Ninth Circuit, courts ordinarily dismiss a complaint without
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1 prejudice when the basis for dismissal is non-exhaustion of
2 administrative remedies. Vaden v. Summerhill, 449 F.3d 1047, 1051
3 (9th Cir. 2006); Wyatt, 315 F.3d at 1120. Defendants, citing Berry
4 v. Kerik, 366 F.3d 85, 88 (2d Cir. 2004), argue that the Court
5 should deviate from this general principle and dismiss the
6 Complaint with prejudice because Plaintiff's failure to file a
7 timely Form 602 has barred him from future relief under
8 California's grievance system for prisoners.

9 The Court agrees that granting Plaintiff leave to amend would
10 be futile. Given the absence of extenuating circumstances,
11 Plaintiff's opportunity to exhaust expired many years ago, and no
12 amendment could allow him to state a claim that would survive a
13 motion to dismiss for non-exhaustion. Other courts have reached
14 similar conclusions in the wake of Woodford. See Lipsey v. Reaume,
15 2010 WL 3397046 at *8 (C.D. Cal.); Janoe v. Garcia, 2007 WL 1110914
16 at *9 (S.D. Cal.); see also Pough v. Almaguer, V.M., 2010 WL 796748
17 at *10 (S.D. Cal.) (noting that the Ninth Circuit stricture to
18 dismiss unexhausted claims without prejudice pre-dated Woodford).
19 Plaintiff's complaint is therefore dismissed with prejudice.
20 Because the Court dismisses the Complaint with prejudice on the
21 basis of non-exhaustion, it does not reach Defendants' other
22 arguments for dismissal or their motion for summary judgment.

23 II. Other Motions

24 Plaintiff includes in his opposition a motion to compel
25 discovery responses. As Defendants note, the motion is
26 procedurally defective under Rule 37(a)(1) because it was not
27 noticed. It also comes, without any justification, after the
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1 scheduled date for dispositive motions. Even if the Court chose to
2 overlook these procedural defects, Plaintiff does not seek to
3 elicit information from Defendants that would challenge the basis
4 for dismissal -- failure to exhaust administrative remedies.
5 Accordingly, Plaintiff's motion to compel is DENIED.

6 Plaintiff also moves for appointment of counsel. In June,
7 2010, the Court denied Plaintiff's motion for appointment of
8 counsel but granted his request to supplement the motion with
9 additional documents. (Docket No. 16). Plaintiff now renews his
10 request. (Docket No. 35). "A district court will secure counsel
11 for an indigent civil litigant under section 1915(d) only under
12 'exceptional circumstances . . .'" United States v. 30.64 Acres of
13 Land, 795 F.2d 796, 799 (9th Cir. 1986) (citation omitted). A
14 determination of exceptional circumstances requires the court to
15 examine "the likelihood of success on the merits [and] the ability
16 of the petitioner to articulate his claims pro se in light of the
17 complexity of the legal issues involved." Weygandt v. Look, 718
18 F.2d 952, 954 (9th Cir. 1983). Given that Plaintiff's claims are
19 barred for failure to exhaust administrative remedies, there is no
20 possibility of success on the merits. Accordingly, the motion for
21 appointment of counsel is DENIED.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss is GRANTED and motion for summary judgment is DENIED as moot. (Docket No. 24). Plaintiff's motion to compel is DENIED (Docket No. 30), as is the motion for appointment of counsel. (Docket No. 35).

IT IS SO ORDERED.

Dated: 8/11/2011


CLAUDIA WILKEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

FRANCISCO GARCIA,

Plaintiff,

v.

A A LAMARQUE et al,

Defendant.

Case Number: CV09-02235 CW

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on August 11, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Francisco Garcia K-38818
Calipatria State Prison
P.O. Box 5002
Calipatria, CA 92233

Dated: August 11, 2011

Richard W. Wieking, Clerk
By: Nikki Riley, Deputy Clerk

United States District Court
For the Northern District of California